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FRENCH COURT FORCES GOOGLE TO PROACTIVELY BLOCK PHOTOGRAPHS OF SEXUAL ESCAPADE FROM IMAGE SEARCH

By **Giancarlo Frosio** on November 21, 2013 at 3:16 pm

The long standing saga of Max Moseley's sexual images has recently offered European decision makers a new opportunity to strike a balance between freedom of expression and the right of privacy in light of the ubiquitous and unstoppable distribution of information propelled by the power of Internet search engines. When courts are confronted with novel questions, finding adequate solutions may be extremely challenging. But once again European courts seem to prefer to sideline freedom of expression in favor of protecting other fundamental rights.

In 2008, the newspaper News of the World published photos of Max Mosley, former head of the Fédération Internationale de l'Automobile, engaged in sexual roleplaying with prostitutes dressed as German prison guards. News of the World's headline accompanying the photos referred to a "Sick Nazi Orgy." Mosley successfully sued the newspaper in the [UK](#) and later in France for breach of privacy. At the same time, Mosley [unsuccessfully tried](#) to obtain a judgment from the European Court of Human Rights holding that member states should legislate under [Article 8 of the European Convention of Human Rights](#) to prevent newspapers from publishing stories regarding individuals' private lives without first warning the concerned party.

However, the Internet is more difficult to control than traditional newspapers. Mosley's images went viral and people linked to them endlessly in cyberspace. Since then, Mosley has started a personal battle with the Internet, specifically with search engines. He claims these tools are the "really dangerous thing" that allow the entire world to find what otherwise would be found only by "a few friends of the person who posts it." Therefore, Google has become a primary target of Mosley's discontent.

Mosley sued Google in several European countries, demanding the company filter out of search results any online photos of his sexual escapade, alleging the online publication of these images infringes Mosley's right of privacy. The Tribunal de Grande Instance in Paris recently granted Mosley's petition and ordered Google to remove from its image search results for a period of five years any appearance of nine images Mosley identified. The Court has given Google two months to comply. The order requiring Google to remove the images from the result page is, in the court's view, intended to prevent Google from "contributing and amplifying the indisputable attacks through various websites" to Mosley's private life.

The order goes beyond requiring the company to remove links to Mosley-related material on a case-by-case basis, which fits within Google's existing policies and which the company has already done for hundreds of copies of the photos at issue. Rather, the French Court ordered Google to build an automated censorship machine. The filter should automatically detect pages containing the infringing photos and proactively block

those photos from search results. In other words, the new software filter should catch and remove new versions of posted images continuously.

Some discussion has occurred regarding the enormous costs to Google to implement this censorship system. The French court, however, sidelined Google's concerns based on other evidence to the contrary. In particular, the court noted that blocking the search results may be simple and inexpensive, and present technology, such as PhotoDNA, makes it possible to filter not only exact copies of identified images but also modified copies. In general, with these technologies, the risk of over-filtering may still be present insofar as this software cannot assess the context in which an image may appear. However, the French Court disregarded the problem of over-filtering, because the images have been found to be unlawful after multiple judicial reviews and the blocking measure is specifically requested by a judicial authority.

In the view of the French Court, Google's liability stems from the inapplicability of the safe harbors provided by the French implementation of the Directive on Electronic Commerce. On one side, Google Image Search does not enjoy the caching exemption because search engines are not required to perform automatic storage of images in order to make their future transmission more efficient. On the other side, the hosting exemption is inapplicable because Google had at least knowledge of the unlawfulness of the content present in its Image Search. In this respect, the French court construed Google's refusal to accept the request of Mosley to remove the unlawful pictures from the search engine results *ex ante*, rather than removing the pictures pursuant to a targeted request from Mosley, as an evidence of actual knowledge.

In passing, the Tribunal de Grande Instance also considered the fact that Google's activity may not be "purely technical, automatic and passive" as required by the Directive for the exemption to be triggered. The Google Search engine's algorithms are, in fact, based on "editorial choices" by the engineers who developed them. These "editorial choices" do not correspond to a neutral and passive role implicating that the host "has neither knowledge nor control over the information transmitted or stored," as required by the Directive.

As Google said, this is "a troubling ruling with serious consequences for free expression." This case creates unintended and undesirable consequences for freedom of expression online. Legitimate content, including news coverage related to the story, may inadvertently or accidentally be blocked as well. Additionally, France ordered Google to filter all image search results worldwide, regardless of the fact that different laws apply outside France. Other jurisdictions may strike a different balance between freedom of expression and privacy rights. The French Court justified measures targeting other sites than google.fr by asserting that it is up to Google to demonstrate that listings on Google's other websites have no impact on the French territory where the images were found to constitute a criminal offense.

Under the assumption that it does not have an obligation to police the net and conduct *ex ante* surveillance of the content it indexes, Google has initially refused to comply with Mosely's request and will appeal this French court decision. Meanwhile, a German court is reviewing the same matter and a decision is expected from it in the next few months.

The question these courts are trying to answer is part of the broader conundrum of the role of intermediaries in the digital environment. European courts are deciding whether and when search engines and other Internet platforms should help police the net, up to and including automated monitoring and advance blocking of published content. Placing the burden of proactively policing content on search engines may have multiple negative consequences. It will stifle innovation and speech around the world. The way courts answer this question will either preserve the Internet's free and open nature for the future, or damage it, potentially severely.

Focus Areas: Intermediary Liability

Related Projects: World Intermediary Liability Map (WILMap)

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